

The Constitution's Amending Article: Illusion or Necessity

Robert G. Weclaw

Follow this and additional works at: <https://via.library.depaul.edu/law-review>

Recommended Citation

Robert G. Weclaw, *The Constitution's Amending Article: Illusion or Necessity*, 18 DePaul L. Rev. 167 (1968)
Available at: <https://via.library.depaul.edu/law-review/vol18/iss1/7>

This Article is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact digitalservices@depaul.edu.

THE CONSTITUTION'S AMENDING ARTICLE: ILLUSION OR NECESSITY

ROBERT G. WECLEW*

ARTICLE V¹ of our federal constitution contains the seeds for the destruction of the entire Constitution. It also contains potentialities for expansion and modification of every power therein contained. The use of correct procedure in proposal and ratification could result in the destruction of all individual rights, the elimination of the federal government, the legal disappearance of the states or any portions of them or a complete redistribution of power.

The express limitations on the amending power, three in number, concern constitutional modifications in the direct tax and slave trade provisions prior to 1808 and deprivation of any state's equal suffrage in the Senate. The direct tax and slave trade provisions having expired, the only express limitation presently operative is on equality. If a state consents, it could be deprived of a senator. If two-thirds of both houses of Congress proposed reducing the representation of all the states to one senator or abolishing the states entirely, and either proposal was ratified by three-fourths of the legislatures or conventions in the states, equality of suffrage would prevail and no state could object. The equal suffrage provision, rather than being an absolute express limitation, is a conditional express limitation. It aims at the inclusion of the state whose equality is diminished as a ratifier. If the state agrees, its equality in the Senate may be reduced by amendment. If the state refuses, its equality may not be reduced. Assuming

** Mr. Weclaw is a Professor of Law and Acting Dean at DePaul University College of Law. He received his J.D. at Northwestern University. He is a member of the Illinois Bar.*

¹ The article reads as follows: "The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."

the above express limitations (two expired and one conditional on the affected state's consent), it is difficult to find any implied limitations following the rule that exceptions from a power determine its extent.² Given three exceptions, virtually any other governmental power or private right would be open to change through the amending process.

The wide spread between the attempted use of this virtually limitless power and its successful use becomes evident when we see that over 5,000 amendments were proposed from 1789 to 1963,³ but as of this date only 25 have been ratified. Of these, the first ten were actually a supplement to the original Constitution since it was generally understood and informally agreed that a Bill of Rights would follow.

Ratification of the first ten amendments was completed December 15, 1791. The eleventh amendment, preventing suit against a state by citizens of another state, became effective in 1795. The twelfth amendment, changing the procedure of voting for the President, was probably ratified in 1804. Except for three Civil War amendments written during a time of crisis, there was actually no amendment for over one hundred years until the sixteenth amendment (income tax) was enacted in 1913. The eighteenth and twenty-first amendments, to a certain extent, cancelled each other. The nineteenth, granting suffrage to women was ratified in 1920, and the twentieth, changing terms of elected federal officials, the assembly time of Congress, and presidential succession was approved in 1933. The twenty-second (1951) limited the President to two terms. The twenty-third (1961) gave the District of Columbia the right to cast electoral votes for President.⁴ The twenty-fourth (1964) abolished the poll tax in federal elections.⁵ The twenty-fifth (1967) provided answers to the formerly troublesome problems of presidential inability and succession to the vice-presidency.

AMENDMENT BY EXTRA-LEGAL MEANS

There is obviously a wide gap between the discernable need for formal amendment and the actual adoption of select amendments as

² Platz, *Article Five of the Constitution*, 3 GEO. WASH. L. REV. 17, 24 (1934).

³ Senate Library, *PROPOSED AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA*, S. DOC. NO. 163, 87th Cong., 2d Sess. Preface at IV (1963).

⁴ *Id.* at 231-243.

⁵ U.S. CONST. amend. XXIV.

part of the framework of our government. Yet our 7,000 word document survives and seemingly belongs to each new living generation.⁶ It is a viable document that adequately serves the needs of our people, "a constitution, intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs."⁷

While some of the draftsmen of the Constitution felt amendability was necessary to meet unanticipated difficulties that might eventuate from this experiment in attempting to provide stability to government, others doubted the propriety or necessity for amendment.⁸ Mr. Justice Brandeis said, "A code of law that makes no provision for its amendment provides for its ultimate rejection."⁹ Is this true or is the position of the doubters correct in view of the unfolding of our constitutional system?

Let us assume that an amending article never found its way into the Constitution. Although it is true that our government is one of enumerated powers and that Congress cannot act unless under a power expressly or impliedly conferred, implications might well arise that amendment by the ordinary legislative methods or through the same power by which the Constitution was originally promulgated could be had.¹⁰ Thus, if vitally necessary to the country's best interests, the power of Congress to call a constitutional convention with ratification by conventions in the states might be justified by implication; or this might be held to be an inherent power of Congress. The Court has said that the powers to maintain diplomatic relations with other countries, declare and wage war, make treaties, "if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality."¹¹ If necessary to avert severe domestic disturbance, the Court might well find the amending power to be an inherent power, the exercise of which is preferable to such domestic discord as might lead to no government at all.

The basic written document, as history has shown, may be modi-

⁶ CAHN, *An American Contribution*, in *SUPREME COURT AND SUPREME LAW* 12 (1954).

⁷ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819).

⁸ PRESCOTT, *DRAFTING THE FEDERAL CONSTITUTION* 685 (1941); 5 ELLIOT'S *DEBATES* 128-182 (1866 ed.); ORFIELD, *AMENDING THE FEDERAL CONSTITUTION* 2-7 (1942).

⁹ *THE WORDS OF JUSTICE BRANDEIS* 26 (Goldman ed. 1953).

¹⁰ WILLOUGHBY, *THE NATURE OF THE STATE* 213 (1928); ROTTSCHAEFER, *CONSTITUTIONAL LAW* 9 (1939).

¹¹ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936).

fied by legal means or extra-legal means. Article XIII of the Articles of Confederation said, "nor shall any alteration at any time hereafter be made in any of them [the Articles of Confederation]; unless such alteration shall be agreed to in a Congress of the United States, and be afterwards confirmed by the Legislatures of every state." Article VII of the Constitution said it would be effective when ratified by conventions in nine of the states. Contrary to the specific words of the Articles of Confederation, the Constitution went into effect before it was ratified by North Carolina and Rhode Island.¹² It became effective through revolutionary means, but had the Supreme Court held the Constitution invalid, the Court itself would have been invalid.¹³

AMENDMENT USING ARTICLE V

Although it is true that "Article 5 of the Constitution contains the only provision prescribing how it might be amended,"¹⁴ these provisions are seldom the vehicle for change. Granted, in certain matters, formal amendment is the answer, *e.g.*, changing of numbers (a four year term for the President, two year terms for representatives, six year terms for senators), could hardly be accomplished by other than formal amendment because of the specificity and exactness of the constitutional provisions. They leave little room for interpretation. An exact, unwavering meaning of a specific term that has deep roots in history, *e.g.*, jury, could not be abruptly changed without formal amendment. Complex situations of a distinctly political nature, such as presidential succession, disability, and election should be met by formal amendment, although Congress has to some extent handled some of the problems in this area by legislation.

Sometimes a formal amendment is needed to reverse a Supreme Court decision. The eleventh amendment reversed *Chisholm v. Georgia*.¹⁵ The fourteenth amendment reversed *Dred Scott v. Sandford*.¹⁶ The sixteenth amendment reversed *Pollock v. Farmers' Loan*

¹² BURDICK, LAW OF THE AMERICAN CONSTITUTION 34 (1922).

¹³ ORFIELD, AMENDING THE FEDERAL CONSTITUTION 9 (1942).

¹⁴ ROTTSCHAEFER, CONSTITUTIONAL LAW 388 (1939).

¹⁵ 2 U.S. (2 Dall.) 419 (1793).

¹⁶ 60 U.S. (19 How.) 393 (1856).

*& Trust Co.*¹⁷ These situations represent the exception rather than the rule. The Court seldom resists vitally strong public sentiment for long periods of time, believing that, like politics, constitutional law is the art of the possible.¹⁸

[W]hen convinced of former error, this Court has never felt constrained to follow precedent. In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions. This has long been accepted practice, and this practice has continued to this day.¹⁹

MODIFICATION WITHOUT ARTICLE V

When dealing with generalities and broad concepts, the imprecise nature of the constitutional grants and limitations puts the Court into a "continuous process of constitution-making."²⁰ The elasticity and adaptability of the commerce clause, the spending power, due process, and the war power enable the Court, by the interpretation and re-interpretation of such terms, to meet most problems as they arise. The school of liberal constructionists are able to accomplish through judicial review what the strict constructionists believed could be accomplished only through formal amendment. Broad concepts, unrestrained by constitutional limitations, allow the Court to handle new situations as they arise within the framework of the document. Much of the successful continuity of the Court's processes has been due to its ability to recognize and define constitutional concepts in terms of changing political, economic, moral, and social milieus. Whether the Court is properly recognizing and defining the concepts is often-times a matter of divided opinion. There has been considerable criticism directed at the Court for ignoring precedent, for legislating, and for following its own predilections. Much of this criticism has come from individual members of the Court itself.²¹ For example, Mr. Justice

¹⁷ 157 U.S. 429 (1895); 158 U.S. 601 (1895).

¹⁸ McCloskey, *THE AMERICAN SUPREME COURT* 23 (1960).

¹⁹ *Smith v. Allwright*, 321 U.S. 649, 665 (1944).

²⁰ Maxwell, *The Supreme Court in the American Constitutional System*, 33 NOTRE DAME LAW. 523, 540 (1958).

²¹ Kurland, *The Court of the Union or Julius Caesar Revised*, 39 NOTRE DAME LAW. 636 (1964). Kurland cites numerous specific criticisms by various justices of majority action the justices deem unwarranted under the Constitution.

Black's recent dissent from the decision finding the Virginia poll tax invalid:

[T]here is no constitutional support whatever for this Court to use the Due Process Clause as though it provided a blank check to alter the meaning of the Constitution as written so as to add to it substantive constitutional changes which a majority of the Court at any given time believes are needed to meet present-day problems. . . . If basic changes as to the respective powers of the state and national governments are needed, I prefer to let those changes be made by amendment as Article V . . . provides.²²

The Constitution contains silences, omissions, and in many instances the vagueness of language that compromise brings about. There were many matters of constitutional import that did not become part of the document,²³ or that could become so only by stretching the resulting powers concept, or the necessary and proper clause. Some were deliberately left out or glossed over, so as to effectuate the necessary degree of compromise, and therefore secure ratification and not wreck the convention. The convention, in effect, was leaving the solution of these matters to branches of the future government including the Supreme Court. Removal from office,²⁴ creation of governmental corporations,²⁵ judicial review,²⁶ and the acquisition of territories²⁷ are examples of some of the silences that were later litigated without their having been mentioned in the original document or having been added by formal amendment.

OTHER FORMS OF INFORMAL MODIFICATION

Conventions and usages are matters within the general range of the Constitution that have not been dealt with in specific provisions or words. They have been factors in changing or modifying specific phrases and clauses of the Constitution although the words might remain the same. A usage is a practice of long standing or the customary method of procedure. A convention is a permanent, fixed

²² *Harper v. State Board of Elections*, 383 U.S. 663, 675-676 (1966) (dissenting opinion).

²³ WILLIS, *CONSTITUTIONAL LAW OF THE UNITED STATES* 122 (1936).

²⁴ *Myers v. United States*, 272 U.S. 52 (1926).

²⁵ *Supra* note 7.

²⁶ *Marbury v. Madison*, 5 U.S. (1 Cr.) 137 (1803).

²⁷ *DeLima v. Bidwell*, 182 U.S. 1 (1901).

usage.²⁸ The line between custom and usage is not always easy to draw.

Vice-President Tyler, upon President Harrison's death, did not become Acting President assuming the duties and powers of the office. He assumed the office of President claiming his right to the office and to the title. *De jure* recognition as President was accorded him. This precedent was followed each time the President died in office, and it became a convention modifying the Constitution to that extent.²⁹ Some other conventions and usages are the popular election of the President in the states, the powers of the Speaker of the House of Representatives, the party caucus, and senatorial courtesy.

Executive acts may have an amending force in the constitutional scheme. Executive agreements with foreign nations have to some extent displaced the treaty making power. The cabinet, a creature of the President, is both extra-statutory and extra-constitutional.³⁰

The necessary and proper clause, as interpreted, has enabled Congress to enact a vast body of legislation of a constitutional nature, implementing and expanding virtually every power in the Constitution, particularly the important powers such as commerce, spending, war, postal, money and fiscal. Statutes might be said to implement the Constitution when they assist defining the governmental framework, or when they place in operation or expand powers conferred by the Constitution, or when they extend the range of its operations. These statutes are sometimes called constitutional statutes.³¹ The Judiciary Act of 1789, the statutes creating legislative courts, and those creating the broad network of administrative agencies fall into this category.

Two other possible forms of informal amendment might be mentioned at this point. Amendment through disuse of certain portions of the Constitution has been suggested.³² For example, certain portions of the fourteenth amendment, such as the provision for political disabilities for certain classes of citizens and the prohibition against payment of debts in aid of insurrection, serve no useful purpose at this time. Although enforcement may be an important ingredient in

²⁸ WEAVER, CONSTITUTIONAL LAW AND ITS ADMINISTRATION 87 (1946).

²⁹ ROSSITER, THE AMERICAN PRESIDENCY 209 (rev. ed. 1959).

³⁰ WEAVER, *supra* note 28, at 93.

³¹ *Id.* at 54.

³² Garrett, *Amending the Federal Constitution*, 7 TENN. L. REV. 298 (1930).

our conception of the law, American law generally considers statutes and amendments in force unless repealed by a later statute or amendment.³³

Amendment by acquiescence, with reference to the slavery amendments, claimed to have been ratified by less than three-fourths of the states, with some of those being coerced, has been suggested, since such acquiescence has existed for a considerable period of time.³⁴ This point becomes somewhat academic in light of *Leser v. Garnett*,³⁵ in which the court said the proclamation of the Secretary of State was "conclusive on the courts" as against objections that might be raised as to the legislative procedure by which ratification was obtained. Four members of the Court who concurred in *Coleman v. Miller* said that the amending process "is 'political' in its entirety, from submission until an amendment becomes part of the Constitution, and is not subject to judicial guidance, control or interference at any point."³⁶ Further, article V is separate and independent from the rest of the Constitution, regarding both the substance and procedure of the amendment, and contains no implied limitations.

THE BILL OF RIGHTS

Assume the amending power does not and did not exist in the Constitution. What about our Bill of Rights? Madison's view was that the amendments should be inserted into the Constitution at the appropriate places; *e.g.*, jury trial provisions were to be made part of the jury trial provisions of article III. Various provisions prohibiting Congress from infringing upon certain rights of citizens would follow article I, section 9, with its prohibitions against bills of attainder and ex post facto laws.³⁷ If there had been no amending clause, the Constitution would not have been ratified unless Madison's views were adopted and the amendments comprising the Bill of Rights inserted directly into the Constitution so as to actually be a part of it. The amending article was a strong selling point in obtaining approval of

³³ ORFIELD, *supra* note 13, at 81-82.

³⁴ WILLIS, *supra* note 23, at 127-128.

³⁵ 258 U.S. 130, 137 (1922).

³⁶ 307 U.S. 433, 459 (1939).

³⁷ PRITCHETT, *THE AMERICAN CONSTITUTION* 368 (1959).

the original document.³⁸ Against objections to the proposed document, the compromise of amendability provided the answer. There was a widespread demand in the state conventions assembled to ratify the original document, that there be additions to it setting forth principles and prohibitions, contained in what we now call the Bill of Rights. Massachusetts, South Carolina, New Hampshire, Virginia, and New York demanded, in their acts of ratification, that a Bill of Rights or portions thereof be made part of the Constitution. North Carolina insisted on a Declaration of Rights and did not ratify until late in 1789.³⁹ Since ratification of the Constitution became conditioned on congressional proposal of a Bill of Rights, the first ten amendments may be considered as virtually part of the original document.

Arguments were advanced that amendments were not and would not be necessary. The body of the instrument contained numerous assurances of personal rights, including the right to habeas corpus, a prohibition against bills of attainder and ex post facto laws, a guarantee of jury trials, a definition of treason, and the "no religious Test" of article VI.⁴⁰ The federal government was one of limited, enumerated powers, with a division of functions, separation of powers, and checks and balances preventing any assumption of dictatorial power. Further, the vast expanses of the country would allow anyone to remove himself readily from most government frustrations.⁴¹ Hamilton thought a Bill of Rights unnecessary in our system, since the people retained everything they had not surrendered, and because they had retained all and surrendered nothing contained in the Bill of Rights, there was no need for them to specify the reservation of any rights.⁴²

Pinckney's statement with reference to freedom of the press could apply equally to other protections proposed:

The general government has no powers but what are expressly given to it; it therefore has no power to take away liberty of the press. That invaluable blessing which deserves all the encomiums the gentleman has justly bestowed upon it, is secured by all our state constitutions; and to have mentioned it in our general constitution

³⁸ CAHN, *supra* note 6, at 11-12.

³⁹ Garrett, *supra* note 32, at 295-296.

⁴⁰ Black, *The Bill of Rights*, 35 N.Y.U.L. REV. 865-866 (1960).

⁴¹ PRITCHETT, *supra* note 37, at 367.

⁴² THE FEDERALIST No. 84 (Hamilton).

would perhaps furnish an argument hereafter, that the general government had a right to exercise powers not expressly delegated to it.⁴³

There was a strong feeling, particularly among those who disliked a strong central government, that the Bill of Rights would guard against federal abuse of power, and particularly the exceptionally broad power to pass all laws necessary and proper to carry into effect the other powers given to the national government.⁴⁴ The first Congress agreed with those who wanted additional assurances, and submitted to the states several amendments in the nature of a Bill of Rights which became effective in 1791.

The second and third amendments, regarding bearing of arms and quartering of soldiers, have had little genuine constitutional significance. It is possible that the common law would have made effective the procedures set forth in the third through eighth amendments, had these amendments not been adopted.

Much of the force of the tenth amendment was lost when the Court said:

The [tenth] amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.⁴⁵

THE ELEVENTH AMENDMENT

There was little doubt at the time the Constitution was ratified that a state could not be sued without its consent. There was probably no intention to allow suits by citizens of one state against another state under article III which says "the judicial power shall extend to . . . controversies . . . between a state and citizens of another state."⁴⁶ Hamilton did not think such a right was given.⁴⁷ In *Chisholm v. Georgia*⁴⁸ the Court, with one dissent, said a citizen had such a right.

⁴³ 3 FARRAND, RECORDS OF THE CONSTITUTIONAL CONVENTION 256 (1937).

⁴⁴ Hart, *Power of Government over Speech and Press*, 29 YALE L.J. 410, 412 (1920).

⁴⁵ United States v. Darby, 312 U.S. 100, 124 (1941).

⁴⁶ BURDICK, *supra* note 12, at 93.

⁴⁷ THE FEDERALIST No. 81 (Hamilton).

⁴⁸ 2 U.S. (2 Dall.) 419 (1793).

The unpopularity of the decision resulted in quick passage of the eleventh amendment forbidding such suits.

The courts have tended to constrict the meaning of the eleventh amendment and to reinstate *Chisholm*. Courts may change considerably the opinion of the people as expressed in a constitutional amendment.⁴⁹ Deep inroads have been made in allowing suits against officers of the state. For example, the federal courts will entertain jurisdiction where a state officer acts without constitutional authority.⁵⁰ Injunctions are allowed against state officials when their action is without authority of state law or contravenes statutes or the Constitution.⁵¹ Where a state officer acts unconstitutionally under a valid statute, this is not a suit against the state forbidden by the eleventh amendment.⁵² Where a state officer acts exceeding his authority, or under authority not validly conferred or contrary to law, in taking and holding land without just compensation, his illegal act can be restrained or an action can be maintained against him individually.⁵³ The reports are replete with cases of this type wherein it is said that the action is not against the state and therefore does not contravene the eleventh amendment.

AMENDMENTS REGARDING THE PRESIDENCY

The twelfth, twentieth, twenty-second, twenty-third, and twenty-fifth amendments relate to the presidency. There are many specifics contained in these amendments, such as exact proportions and figures, and these could not be changed by interpretation.

Under paragraph 3, section 1 of the second article of the Constitution, each elector votes "by ballot for two persons, of whom at least one shall not be an inhabitant of the same state with themselves." Although it was a notorious fact that the intention of the electors in the 1800 election was to install Jefferson as President and Burr as Vice-President, each got 73 votes, thereby throwing the election into

⁴⁹ 2 BOUDIN, GOVERNMENT BY JUDICIARY 317 (1932).

⁵⁰ Georgia R.R. & Banking Co. v. Redwine, 342 U.S. 299 (1952).

⁵¹ Worcester County Trust Co. v. Riley, 302 U.S. 292 (1937).

⁵² Peay v. Cox, 190 F.2d 123 (5th Cir. 1951), *cert. denied*, 342 U.S. 896 (1951).

⁵³ Colorado *ex rel.* Watrous v. District Court of United States, 207 F.2d 50 (10th Cir. 1953).

the House of Representatives.⁵⁴ Congress accordingly proposed the twelfth amendment to replace this provision of the document. Instead of casting votes for two persons, it provides for the casting of separate ballots by each elector, one for the President and the other for the Vice-President.

The first section of the twentieth amendment deals with specific dates. The terms of the President and Vice-President end at noon on January 20th, instead of March 4th as was the situation previously. The terms of representatives and senators end at noon on January 3rd, instead of March 4th. The terms of the successors to these offices begin immediately. The House of Representatives no longer votes for the President by March 4th as provided in the twelfth amendment. This section of the twentieth amendment was designed to abolish lame duck legislators and lame duck sessions of Congress. This in turn denies defeated members of the House of Representatives the right to cast ballots for the President if the election is thrown into the House. Theoretically, prior to the amendment, the defeated House members could install the defeated presidential candidate.

The Constitution specifies terms of four years for President, six years for senators, and two years for representatives. Those in office at the time of the amendment's adoption had their terms shortened. This could have been accomplished only by amendment.

Under the second section of the same amendment, Congress assembles at least once a year, and its meeting begins January 3rd. It had, under the fourth section of article I, been the first Monday in December.⁵⁵

Sections three and four, which furnish more specific guidance regarding presidential succession, particularly where the problem arises before the beginning of the new chief executive's term, are welcome and helpful. Yet, the sixth paragraph of section one of article II, although not satisfactory or sufficiently precise in the context of the numerous politically explosive situations that might arise, was probably of a sufficiently general nature to encompass most situations regarding the President's successor.⁵⁶

⁵⁴ BLACK, CONSTITUTIONAL LAW 47 (1910).

⁵⁵ S. REP. NO. 26, 72d Cong., 1st Sess. 2-6 (1932).

⁵⁶ The sixth paragraph reads as follows: "In Case of Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the same shall devolve on the Vice President, and the Congress may by

Congress thrice legislated concerning the performance of presidential duties in case of removal, resignation, death, or inability of *both* the President and the Vice-President.⁵⁷ These laws were basically concerned with which cabinet members or legislative officers should succeed and in what order. They were not concerned with the procedures for a determination of the President's ability or inability by the President and/or the Vice-President. They were not concerned with seeking a way to fill the office of the Vice-President if it became vacant. Informal agreements and incomplete legislation filled these gaps, but it remained for the twenty-fifth amendment to spell out the highest executive officer's right to the office so as to give constitutionality and legitimacy to the office free of doubt. The twenty-fifth amendment allows the President to declare himself disabled in favor of the Vice-President who becomes acting President, until the President announces his complete recovery. In addition, the Vice-President, along with a majority of the Cabinet or such other body as Congress may designate, can declare the President's inability. If the President should dispute his inability, it would take a two-thirds vote of both houses of Congress to declare him disabled. The amendment also provides for a means of filling the office of Vice-President through the President's nominating a Vice-President who takes office upon being confirmed by a majority vote of both houses of Congress. Legislation alone could probably have accomplished the objectives of this amendment, and the legislation would probably be held valid on the basis of "the political questions doctrine" and separation of powers; but giving constitutional authority and guidance to questions needing a high degree of certainty is preferable to presidential agreements and legislation.

The twenty-second amendment is specific in limiting the President to two terms. No interpretation, usage, convention, statute, or act of the President could, without this amendment, decide that two terms is the limit. This amendment was proposed by a conservative Congress

Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President and Such Officer shall act accordingly, until the Disability be removed, or a President shall be elected." U.S. CONST., art. II, § 1.

⁵⁷ Act of March 1, 1792, ch. 8, § 9-11, 1 Stat. 240; Act of January 19, 1886, ch. 4, 24 Stat. 1; Act of July 17, 1947, 61 Stat. 380.

and was ratified in 1952 just before a popular, conservative President assumed office. He thought it unwise.⁵⁸

The twenty-third amendment provides for presidential electors from the District of Columbia. Although the District of Columbia is treated as a state under a treaty regulating the inheritance of property within the states of the union,⁵⁹ and as a state for the purpose of levying direct taxes in proportion to the census,⁶⁰ and is a state within the meaning of the diversity clause,⁶¹ it could not be treated as a state when it came to selecting presidential electors. They must be selected by states under the twelfth amendment. The second clause of article II provides, "Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the state may be entitled. . . ." Since, of course, the District has no senators or representatives in Congress, it would be impossible without formal amendment to allow it any electors for President or Vice-President.

THE CIVIL WAR AMENDMENTS

The thirteenth amendment affirmed what the Emancipation Proclamation and the Civil War had already brought about. Whatever may have been accomplished by this amendment could also have been accomplished by the equal protection clause of the fourteenth amendment and the due process clause of the fifth and fourteenth amendments. No court could lend enforcement to any agreement encompassing slavery or peonage.⁶² In deciding a segregation case under the due process clause of the fifth amendment, the Court said: "Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective."⁶³ Slavery could never be associated with a proper governmental objective.

⁵⁸ PRITCHETT, *supra* note 37, at 40.

⁵⁹ *Geofroy v. Riggs*, 133 U.S. 258 (1890).

⁶⁰ *Loughborough v. Blake*, 18 U.S. (5 Wheat.) 317 (1820).

⁶¹ *National Insurance Co. v. Tidewater Co.*, 337 U.S. 582, 604 (1949) (concurring opinion of Rutledge, J.).

⁶² *Shelley v. Kramer*, 334 U.S. 1 (1948).

⁶³ *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954).

The protections of the fifteenth amendment could have been attained under other constitutional provisions. Article I, sections two and four, gives Congress the right to pass laws to protect the right to vote in federal elections once the state has established voter qualifications.⁶⁴ Equal protection and due process forbid discrimination in many matters, including voting.

Much of the fourteenth amendment could be eliminated without loss. The Supreme Court rendered the privileges and immunities clause of the fourteenth amendment an especially weak source for constitutional protection in the *Slaughter-House Cases*.⁶⁵ The second section of the fourteenth amendment, providing for reduction in proportional representation in Congress to states denying suffrage to male inhabitants, has never been implemented. The third section of the same amendment, denying the right to hold public office to those who engaged in rebellion against the United States, was ultimately enforced only against some of the better known leaders. The fourth section, validating the national debt incurred in the Civil War, and prohibiting a state from paying any part of its debt incurred in prosecuting the war, or as compensation for the emancipation of slaves, has become obsolete.⁶⁶

The citizenship clause of the fourteenth amendment contains an element of specificity. The clause was made necessary by *Dred Scott v. Sandford*,⁶⁷ "the most disastrous opinion the Supreme Court has ever written."⁶⁸ The Court held that under Missouri law a slave remains property and is not entitled to his freedom when his owner takes him to a free state and then brings him back; he is neither a citizen of a particular state nor of the United States; and he cannot sue in the federal courts under the diversity clause. Under the Court's holding, there could be no such thing as Negro citizenship. Except for this opinion by a closely divided court, the citizenship clause, although desirable for clarification, would not have been necessary.

The equal protection clause seeks "an equality of treatment of all persons, even though all enjoyed the protection of due process."⁶⁹ The

⁶⁴ *Ex Parte Yarbrough*, 110 U.S. 651, 664 (1884).

⁶⁵ 83 U.S. (16 Wall.) 36 (1873).

⁶⁶ HARRIS, *THE QUEST FOR EQUALITY* at xi-xii (1960).

⁶⁷ 60 U.S. (19 How.) 393 (1857).

⁶⁸ McCLOSKEY, *supra* note 18, at 94.

⁶⁹ *Truax v. Corrigan*, 257 U.S. 312, 333 (1921).

clause, although a valuable tool in eliminating discrimination and unequal classifications on the state level, is not a prohibition against the federal government. Yet the federal system accomplishes the objectives of equal protection by recognizing that "discrimination may be so unjustifiable as to be violative of due process."⁷⁰ Conceivably the fourteenth amendment could boil down to the due process and citizenship clauses.

There are few who would contend that we could or should do without a form of due process to guard against arbitrary state action. If there had been no amending article, insertion of the Bill of Rights into the body of the Constitution would in all probability have been necessary to secure ratification.⁷¹ Could the due process clause, there or in the fifth amendment, have been made applicable against state action? The Court in *Barron v. Mayor and City Council of Baltimore*,⁷² when called upon to decide whether the fifth amendment's due process clause applied to the states, decided that it did not, nor did any of the other provisions of the Bill of Rights apply to state action. It has been said that "the decision of the Court, and the doctrine for which it stands, constitute, in fact, one of the most extensive and indefensible of all the various failures of the Court to enforce the Constitution against the states as the document is written."⁷³ Repeated attempts were made to overturn this decision. The Court was asked to overturn its ruling in *Barron* on seven different occasions between 1833 and 1869, and seven times it refused to do so.⁷⁴ A search for protection of certain rights from adverse state action led to additional attempts to overturn *Barron*. There were at least twenty cases from 1877 to 1907 in which the Court reaffirmed the Marshall ruling in *Barron* when asked to deny it.⁷⁵ A different ruling in any one of these cases could have

⁷⁰ *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943).

⁷¹ PRITCHETT, *supra* note 37, at 368.

⁷² 32 U.S. (7 Pet.) 243 (1833).

⁷³ 2 CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 1081 (1953).

⁷⁴ See O'Brien, *The Blaine Amendment 1875-1876*, 41 U. DET. L. J. 137, 196 (1963). O'Brien cites the following cases: *Livingston v. Moore*, 32 U.S. (7 Pet.) 546 (1833); *Permoli v. City of New Orleans*, 44 U.S. (3 How.) 561 (1844); *Fox v. Ohio*, 45 U.S. (5 How.) 447 (1846); *Smith v. Maryland*, 59 U.S. (18 How.) 71 (1855); *Withers v. Buckley*, 61 U.S. (20 How.) 84 (1857); *Pervear v. Massachusetts*, 72 U.S. (5 Wall.) 475 (1866); *Twitchell v. Pennsylvania*, 74 U.S. (7 Wall.) 321 (1868).

⁷⁵ Warren, *The New "Liberty" under the Fourteenth Amendment*, 39 HARV. L. REV. 431, 436 (1926).

eliminated the need for the most important of all the provisions in the fourteenth amendment, its due process clause, since a different ruling could have made the Bill of Rights, including the due process clause of the fifth amendment in its entirety, applicable to the states.

THE INCOME TAX AMENDMENT

The sixteenth amendment gives Congress the "power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration." This amendment was the direct result of *Pollock v. Farmers' Loan & Trust Co.*,⁷⁶ which held a tax on income from realty and personalty to be a direct tax and invalid because not levied in proportion to the census. The Court said a tax on income from rents is a direct tax by a five to three vote, that a tax on income from personalty is a direct tax by a five to four vote, and that the unconstitutional provisions rendered the entire law unconstitutional by a five to four vote.

Prior to this time the Court, on at least five occasions beginning in 1796, had found the only types of direct taxes to be capitation taxes and taxes on real estate.⁷⁷ Until *Pollock* the right of the government to tax income from both real and personal property had been deemed settled. It is a matter of speculation whether the income tax amendment was really necessary. Other unpopular decisions had been overturned in the past. *Hepburn v. Griswold*,⁷⁸ holding invalid Legal Tender Acts, requiring acceptance of legal tender in payment of agreements made before the acts were passed, was overruled in the *Legal Tender Cases*.⁷⁹

During the interim between the *Pollock* decision in 1895, and the ratification of the Sixteenth Amendment in 1913, the Court gave evidence of a greater awareness of the dangerous consequences to national solvency which that holding threatened,

⁷⁶ 157 U.S. 429 (1895) and 158 U.S. 602 (1895).

⁷⁷ *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796), sustained a tax on carriages; *Pacific Insurance Co. v. Soule*, 74 U.S. (7 Wall.) 433 (1869), sustained a tax on an insurance company's receipts for premiums and assessments; *Veazie Bank v. Fenno*, 75 U.S. (8 Wall.) 533 (1869), sustained a tax on state bank notes; *Scholey v. Rew*, 90 U.S. (23 Wall.) 331 (1875), sustained a real estate inheritance tax; and *Springer v. United States*, 102 U.S. 586 (1881), upheld a general tax on income.

⁷⁸ 75 U.S. (8 Wall.) 603 (1869).

⁷⁹ 79 U.S. (12 Wall.) 457 (1870).

and partially circumvented it, either by taking refuge in redefinitions of "direct tax" or, and more especially, by emphasizing, virtually to the exclusion of the former, the history of excise taxation.⁸⁰

A tax on the sale of a business exchange was held to be an excise tax in *Nicol v. Ames*.⁸¹ A tax on the heirs who received property, rather than on the decedent's estate, was held to be an excise tax in *Knowlton v. Moore*.⁸² A tax on tobacco in the hands of the dealer was said to be an excise tax in *Patton v. Brady*.⁸³ A tax on corporate income was upheld as an excise "measured by income" on the right to do business as a corporation in *Flint v. Stone Tracy Co.*⁸⁴ The sixteenth amendment ended speculation as to whether the Court, without the aid of a constitutional amendment, would persist along these lines until it had reversed *Pollock*.⁸⁵ One writer speculated in 1907 that a new income tax law would be approved by the Court.⁸⁶ He argued that the Court would weigh the unanimous past income tax decisions, one of which was substantially contemporaneous with the Constitution, against the more recent five to four decision enunciated in a time of political excitement. The vote of the fifth man in this closely divided decision, he said, is an historical accident which should not impede constitutional development. Each party, after each election, should be able to reopen political controversies, thereby enabling the Court to restore confidence in itself by restoring the Constitution to its correct meaning.⁸⁷ There is little doubt that, even without the sixteenth amendment, *Pollock's* days were numbered.

THE SEVENTEENTH AMENDMENT

The seventeenth amendment provides for the popular election of senators. Yet, prior to ratification, the voters in many states could designate their preference in the primaries, and the legislatures gen-

⁸⁰ Small, *The Constitution of the United States*, S. Doc. No. 39, 88th Cong., 1st Sess. 1341-1342 (1964).

⁸¹ 173 U.S. 509 (1899).

⁸² 178 U.S. 41 (1900).

⁸³ 184 U.S. 608 (1902).

⁸⁴ 220 U.S. 107 (1911).

⁸⁵ Small, *supra* note 80, at 1342.

⁸⁶ Whitney, *The Income Tax and the Constitution*, 20 HARV. L. REV. 280 (1907).

⁸⁷ *Id.* at 288-290.

erally elected the candidate of the majority.⁸⁸ In two states, candidates for legislative seats were required to support the candidate getting the majority.⁸⁹ At least twenty-nine states by 1912, one year before ratification, were nominating senators on a popular basis giving the legislators little more discretion than that of presidential electors.⁹⁰ The trend indicated that, in a few years, practically all the states would have required popular election of senators, whether or not the seventeenth amendment was passed.

THE EIGHTEENTH AND TWENTY-FIRST AMENDMENTS

The eighteenth amendment, prohibiting the manufacture, sale, or transportation of intoxicating liquor, and the first section of the twenty-first, repealing the eighteenth, would seem to negate any national power in this regard. However, the second section of the twenty-first amendment gives the states power to regulate the transportation, importation, possession, and use of liquors within their boundaries. There has been a trend toward devaluation of the amendment as regards state control, with emphasis instead on the state's police power and the commerce power.⁹¹ The second section of the amendment does not repeal the commerce clause or the export-import clause (article I, section 10, clause 2), or act as "a limitation upon the constitutional powers of the National Government."⁹²

In view of the Court's modern holdings regarding Congress' plenary power over commerce,⁹³ it would seem that Congress could by legislation accomplish the prohibition that the eighteenth amendment was designed to accomplish (at least do as good a job), or Congress could by statute give the states as much control over the liquor traffic as Congress desired.

⁸⁸ Small, *supra* note 80, at 1356.

⁸⁹ *Id.* at 1356.

⁹⁰ *Id.* at 1356.

⁹¹ *Id.* at 1366-1377.

⁹² *Id.* at 1378.

⁹³ See *Wickard v. Filburn*, 317 U.S. 111 (1942); *United States v. Darby*, 312 U.S. 100 (1941); *Clark Distilling Co. v. Western Maryland R. Co.*, 242 U.S. 311 (1917); *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408 (1946).

THE NINETEENTH AMENDMENT

When a female claimed the privilege of voting as a privilege and immunity of United States citizenship under the fourteenth amendment, the Court admitted that women were citizens but said the Constitution conferred no right to vote, and that voing was not a privilege or immunity of United States citizenship.⁹⁴ Yet in 1884 in *Ex Parte Yarbrough*,⁹⁵ the Court found that under the fourth section of article I, the state's voting regulations are adopted, but the right to vote is based upon the Constitution and Congress has the power to pass laws to assure the exercise of that right.⁹⁶

Although the *Yarbrough* decision applied to a Negro desiring to vote, the broad principle could conceivably apply to women, so that classification for voting purposes based on sex could be held an unreasonable classification, violative of both due process and equal protection, thereby allowing the use of article I, section four of the document to protect the right to vote. However, there had been a long, specific, unwavering historical understanding that a state, in prescribing voter qualifications, could exclude women from its voting lists. Change could have been accomplished through liberal constitutional interpretation, but change through amendment was desirable and preferable.

THE TWENTY-FOURTH AMENDMENT

The twenty-fourth amendment denies to the United States and the states the right to use the poll tax as a prerequisite for voting in a federal election. In *Harper v. State Board of Elections*,⁹⁷ the Supreme Court held that Virginia's poll tax, payment of which was to be made before voting in state elections, violated the equal protection clause. The Court said that, "wealth or fee paying . . . has no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned."⁹⁸ If the right to vote, free of a tax, is fundamental in state elections, it is difficult to find any reason why it should not be fundamental in federal elections. Had there not been a

⁹⁴ *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1874).

⁹⁵ 110 U.S. 651.

⁹⁶ *Id.* at 664.

⁹⁷ 383 U.S. 663 (1966).

⁹⁸ *Id.* at 670.

twenty-fourth amendment, the Supreme Court after *Harper* would have no alternative to holding the poll tax invalid in federal elections. A parallel situation arose in two school segregation cases. In *Brown v. Board of Education*,⁹⁹ the Court found that segregation in the public schools of several states violated the equal protection clause. In *Bolling v. Sharpe*,¹⁰⁰ the same type of segregation in the public schools of the District of Columbia was held violative of the fifth amendment. Although the equal protection clause is not applicable to the federal government, there was no difficulty in finding sufficient discrimination to violate the due process clause of the fifth amendment.

SUMMARY AND CONCLUSIONS

If the framers had omitted an amending article, the Constitution probably would have survived. Conceivably the capsuled result could be as follows. The Bill of Rights would have found its way into the main body of the Constitution before its ratification and eventually would have been found applicable to state action, at least in part. Relief could be obtained against state action by citizens of another state without the necessity of resorting to the fiction that the representative of the state is being sued in his individual capacity.

Dred Scott and *Pollock* could not survive and would be overruled by the Court. Prohibition of intoxicating liquors would present no constitutional problem. Poll taxes in federal elections would run afoul of the due process clause. Women would be allowed to vote. Popular elections would, as a rule, determine the choice for senator. The President would be entitled to as many terms as the voters think he should have. The substance of the twelfth, twentieth, and twenty-third amendments would have been proposed by constitutional conventions impliedly authorized, or by the Supreme Court's finding of an inherent power in Congress to call such conventions. Legislation and agreement would provide for presidential succession, now supplied by the twenty-fifth amendment. All this testifies to the flexibility of this most adaptable instrument which would continue to be effective, even without its most awesome power, the power given in the amending article to do anything except deprive a state of equal suffrage in the Senate without its consent.

⁹⁹ 347 U.S. 483 (1954).

¹⁰⁰ 347 U.S. 497 (1954).